KEKATONG SDN BHD

v.

BANK BUMIPUTRA MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-02-790-95]
9 MARCH 1998

CIVIL PROCEDURE: *Service - National Land Code 1965, s. 431(1)(b)(ii) - Companies Act 1965, s. 350 - Form 16D not served at registered office - Effect of such non service - Whether a mere irregularity curable under Rules of the High Court 1980, O. 2 r. 1*

LAND LAW: *Charge - Order for sale - Notice of demand not served at registered office - National Land Code 1965, s. 431(1)(b)(ii) - Effect of such non service*

WORDS & PHRASES: *"May" - Whether mandatory or directory*

The appellant was the registered owner of several pieces of land ('the said lands') which charged the said Lands to the respondent as security for a loan granted by the respondent to a company called Kredin Sdn Bhd ('Kredin'). The registered charge instrument gave the appellant's registered address at Wisma MISC ('the original address') but subsequently this was changed by the appellant to Georgetown Chambers after lodging the relevant Form 44 with the Registrar.

When Kredin defaulted in its loan obligations, the respondent sent a letter of demand followed by a notice of demand in Form 16D to the original address and later commenced proceedings for an order for sale. The statutory notice and all cause papers were also served on the appellant at the original address. The respondent then obtained an order for sale and attempted to sell the said lands by public auction but failed to do so due to an absence of bidders. Some five years later, the appellant took out a notice of motion to set aside the order for sale. The motion was dismissed by the learned judge and hence the instant appeal.

The issue before the court was whether the failure to serve the appellant with the statutory notice and the relevant cause papers at its registered office rendered the service and the resultant order a mere irregularity curable under O. 2 r. 1 of the Rules of the High Court 1980 ('the RHC') or a nullity.

Held:
Per Gopal Sri Ram JCA

[1] The word "or" appearing in s. 431(1)(b)(ii) of the National Land Code 1965 ('the NLC') must be read disjunctively. A company may have a registered office as well as a place of business and they may be located at the same or different addresses. Service at either address is sufficient.

[2] The object of service of process is to bring the proceedings to the notice of the person being served, and there must be a reasonable probability that this object will be achieved. The procedure of "constructive service" is unknown under English law and is equally inapplicable in the Federated Malay States.

[3] When a provision in a statute uses permissive language such as "may", it is a question of legislative intent, dependent upon a number of factors, whether the intended result is mandatory or directory. It is therefore wrong to assume as a matter of course that whenever Parliament uses the word "may" in a statute it never means "must".

[4] The reasoning that a breach of a statutory provision regulating a mode of service is curable by reference to a rule of court ie O. 2 r. 1 of the RHC, is unsupported by authority. It is entirely incongruent to have resort to rules of court to cure the breach of a statutory provision relating to the service of documents. There are authorities which bind this court that certain breaches of procedure are placed beyond the curing provisions of the RHC.

[5] In respect of the service of the notice in Form 16D upon the appellant, the word "may" appearing in the opening paragraph of s. 431(1) of the NLC is not permissive but mandatory so that the service of documents under the NLC must be in compliance with the terms of the section. The reasons being: (a) the ownership of immovable property and all things appurtenant thereto is a very valuable right and is a fundamental right by art. 13 of the Federal Constitution. Accordingly, any deprivation of immovable property must be in strict compliance of both substantial and procedural law; (b) the effect of an order for sale and the proceedings subsequent thereto, including the holding of a public auction, are designed to permanently deprive a registered proprietor of his land. It is of utmost importance that such deprivation is undertaken in strict compliance of the law; and (c) the provisions in the NLC that govern the enforcement of registered charges exist not only as a means of a lender recovering his

money but also for the protection of the chargor. The court, by treating the service provision in s. 431(1) of the NLC as mandatory will ensure that the protection given by the NLC is not rendered illusory.

[6] The statutory demand by way of Form 16D was not served upon the appellant in the manner prescribed by the NLC. The mode of service prescribed by s. 431(1)(b) of the NLC is in terms imperative and the respondent's failure to comply with that section vitiated the order for sale.

[7] The originating summons seeking an order for sale and the other relevant cause papers were not served on the appellant at its registered office. There was in the eyes of the law no service of the summons and other cause papers upon the appellant. Since the order for sale was obtained when there was no service of the court's process upon the appellant as required by law, the order for sale was, and remained a nullity.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu adalah tuanpunya berdaftar beberapa bidang tanah ('tanah-tanah tersebut') dan telah menggadaikan tanah-tanah tersebut kepada responden sebagai jaminan bagi satu pinjaman yang telah diberikan oleh responden kepada sebuah syarikat yang dikenali sebagai Kredin Sdn Bhd. ('Kredin'). Suratcara gadaian yang berdaftar telah memberikan alamat berdaftar perayu sebagai Wisma MISC ('alamat asal tersebut') tetapi kemudiannya ini telah ditukar oleh perayu kepada Georgetown Chambers selepas menyerahkan Borang 44 yang relevan dengan pendaftar.

Ketika Kredin memungkiri kewajipan pinjamannya, responden telah mengirimkan surat tuntutan yang disusuli oleh notis tuntutan dalam Borang 16D kepada alamat asal tersebut dan kemudiannya telah memulakan prosiding untuk satu perintah jualan. Notis berkanun dan kesemua kertas-kertas guaman telah juga disampaikan ke atas perayu di alamat asal tersebut. Responden kemudiannya telah mendapatkan perintah untuk jualan, mendapatkan saman untuk arahan dan cuba untuk menjual tanah-tanah tersebut melalui perlelongan awam tetapi gagal kerana ketiadaan penawar. Lebihkurang lima tahun kemudian, perayu telah mengeluarkan notis usul untuk mengenepikan perintah untuk jualan tersebut. Usul perayu untuk mengenepikan perintah untuk jualan telah diketepikan oleh hakim yang bijaksana dan yang demikian telah mengakibatkan rayuan semasa ini.

Isu di hadapan mahkamah adalah samada kegagalan untuk menyampaikan kepada perayu notis berkanun dan kertas-kertas guaman yang relevan di pejabat berdaftarnya menjadikan penyampaian dan perintah akibatnya adalah suatu luar aturan semata-mata yang boleh dipulihkan di bawah A. 2 k. 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT tersebut') atau suatu ketidak-sahan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perkataan "atau" yang terdapat dalam s. 431(1)(b)(ii) Kanun Tanah Negara ('KTN tersebut') mestilah dibaca secara alternatifnya. Sesebuah syarikat boleh mempunyai pejabat berdaftar dan juga sebuah tempat perniagaan dan kedua-duanya boleh terletak di alamat yang sama atau berlainan. Penyampaian di mana-mana satu alamat adalah memadai.

[2] Tujuan penyampaian saman ialah untuk membawa prosiding itu kepada perhatian orang yang disampaikannya, dan mestilah terdapat kebarangkalian yang sewajarnya bahawa tujuan ini telah dicapai. Prosedur "constructive service" tidak diketahui di bawah undang-undang Inggeris dan begitu juga tidak terpakai dalam Persekutuan Tanah Melayu.

[3] Ketika sesuatu peruntukan dalam sesebuah statut menggunakan bahasa yang membenarkan seperti "may", ianya merupakan persoalan niat perundangan, yang bergantung kepada sebilangan faktor-faktor samada hasil yang diniatkan itu bersifat mandatori atau arahan. Dengan itu adalah salah untuk membuat andaian bahawa tatkala Parlimen menggunakan perkataan "may" dalam sesebuah statut ianya tidak semestinya bermaksud "must".

[4] Alasan bahawa kemungkiran peruntukan berkanun yang menyelaraskan cara penyampaian boleh dipulihkan dengan merujuk kepada kaedah mahkamah iaitu A. 2 k. 1 KMT, tidak disokong oleh autoriti. Secara keseluruhannya adalah tidak sesuai kerana terpaksa berpaling kepada kaedah-kaedah mahkamah untuk memulihkan kemungkiran peruntukan statutori berhubung dengan penyampaian dokumen-dokumen. Terdapat autoriti-autoriti yang mengikat mahkamah ini bahawa sebilangan kemungkiran-kemungkiran prosedur terletak di luar peruntukan-peruntukan KMT yang boleh memulihkan itu.

[5] Berhubung penyampaian notis dalam Borang 16D ke atas perayu, perkataan "may" yang terdapat di perenggan permulaan s. 431(1) KTN bukannya bersifat membenarkan tetapi adalah mandatori supaya penyampaian dokumen-dokumen di bawah KTN itu mestilah mematuhi

terma-terma seksyen tersebut. Alasan-alasannya adalah: (a) Keempunyaan harta tak alih dan kesemua benda-benda yang berkaitan dengannya adalah suatu hak yang amat bernilai dan suatu hak penting menurut Art. 13 Perlembagaan Persekutuan. Berikutan itu, sebarang perlucutan harta tak alih mestilah mematuhi dengan tegasnya kedua-duanya undang-undang prosedur dan substansial; (b) Kesan perintah untuk jualan dan prosiding akibat daripadanya, termasuki mengadakan perlelongan awam, adalah bertujuan untuk secara tetapnya melucut hak tuanpunya berdaftar terhadap tanahnya. Adalah amat penting bahawa perlucutan yang sedemikian dijalankan dengan cara mematuhi undang-undang dengan tegasnya; dan (c) Peruntukan-peruntukan dalam KTN yang menguasai penguatkuasaan gadaian-gadaian berdaftar wujud bukan sahaja sebagai satu cara bagi pemberi pinjaman mendapatkan kembali wangnya tetapi juga bagi melindungi penggadai. Mahkamah, dengan menanggapkan peruntukan penyampaian dalam s. 431(1) KTN sebagai mandatori akan memastikan bahawa perlindungan yang diberikan oleh KTN tidak dijadikan suatu tanggapan salah belaka.

[6] Tuntutan statutori melalui Borang 16D telah tidak disampaikan ke atas perayu menurut cara yang ditetapkan oleh KTN. Cara penyampaian yang ditetapkan oleh s. 431(1)(b) KTN adalah menurut terma-terma yang sangat mustahak dan kegagalan responden mematuhi seksyen itu menjadisah perintah untuk jualan itu tak sah.

[7] Saman Pemula yang memohon untuk mendapatkan perintah untuk jualan dan kertas-kertas guaman relevan yang lain telah tidak disampaikan ke atas perayu di pejabat berdaftarnya. Menurut undang-undang penyampaian saman dan kertas-kertas guaman yang lain telah tidak dilaksanakan ke atas perayu. Oleh kerana perintah jualan telah diperolehi sedangkan tidak terdapat sebarang penyampaian proses mahkamah ke atas perayu sepertimana yang dikehendaki oleh undang-undang, perintah untuk jualan telah, dan kekal, sebagai suatu pembatalan.

[Rayuan dibenarkan.]

Cases referred to:

Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 ***(refd)***
Gurtner v. Circuit [1968] 2 QB 587 ***(refd)***
Howard v. Bodington [1877] 2 PD 203 ***(refd)***
In re a Judgment Debtor [1937] 1 Ch 137 ***(cit)***
In re Cespedes [1937] 2 All ER 572 ***(cit)***
Johannes Koplan v. Aw Chen [1970] 1 MLJ 220 ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***
Liverpool Borough Bank v. Turner [1861] 30 LJ Ch 379 ***(refd)***
Muniandy & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 ***(refd)***
PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd [1958] MLJ 113 ***(refd)***
Singh v. Atombrook Ltd [1989] 1 All ER 385 ***(not foll)***
Sockalingam Chettiar v. Somasundaram Chettiar [1941] MLJ 103 ***(cit)***
Vignes v. Stephen Smith & Co Ltd [1909] 53 SJ 716 ***(not foll)***

Legislation referred to:
Companies Act 1965, s. 350
Companies Ordinance 1940, s. 319
National Land Code 1965, ss. 256, 431(1)(b)(ii)
Rules of the Supreme Court, O. 2 r. 1(1)
Companies Act 1985 [UK], s. 725(1)

[Appeal from High Court, Kuala Lumpur; Originating Summons No: 24(31)-763-1986]

For the appellant - KS Narayanan (T Gunaseelan with him); M/s Jayaraman, Ong & Co
For the respondent - Porres P Royan (Yoong Sin Min with him); M/s Shook Lin & Bok

Reported by Ling Hea Hoon

JUDGMENT

Gopal Sri Ram JCA:

This appeal arises from the refusal of the High Court at Kuala Lumpur to set aside an order for sale made pursuant to s. 256 of the National Land Code 1965 ('the Code'). The factual matrix relevant to the appeal is as follows.

The appellant was, at all material times, the registered proprietor of all those lands held under Geran Nos. 19450, 19451, 19452 and 19453 for Lot Nos. 267, 268, 269 and 271 respectively ('the said lands'). On 28 May 1983, the respondent granted a loan of RM30 million to a company called Kredin Sdn. Bhd. ('Kredin'). On the same day, the appellant created a charge over the said lands in the respondent's favour to secure the loan to Kredin. The registered charge instrument gave the appellant's address as "Wisma MISC, Tingkat 8, No. 2, Jalan Conlay, Kuala Lumpur" ('the original address'). However, on 10 July 1985, the appellant notified the Registrar of Companies that it had changed its registered address to "2nd Floor, Georgetown Chambers, 39, Beach Street, Penang" ("the new address"). It did this by lodging with the Registrar the relevant Form 44, which is the form prescribed by the Companies Regulations, 1966.

Clause 16 of the annexure to the charge created by the appellant over the said lands reads as follows:

> Any demand for payment of the amount of the Indebtedness for the time being outstanding may be made by a notice in writing requiring payment within seven (7) days from the date thereof and may be signed on behalf of the Bank by its General Manager, Manager, Assistant Manager, Sub-Manager, Accountant or any other officer of the Bank or by any solicitor or firm of solicitors purporting to act for the Bank and such notice shall be deemed to have been sufficiently served on the Chargor if it is left at the registered office for the time being of the Chargor or at the usual or last known place of business of the Chargor or at such address as the Chargor may notify to the Bank or if sent by registered letter to any of such addresses and, in the last mentioned case, the service shall be deemed to be made at the time when the registered letter will in the ordinary course of post be delivered."

Kredin defaulted in meeting its obligations under the loan agreement. From late February 1986, the respondent took steps to realise its security. It sent a letter of demand to the appellant at the original address. It also issued a notice of demand in Form 16D prescribed by the Code and later commenced proceedings for an order for sale. It served statutory notice and all cause papers on the appellant at the original address.

According to the affidavit of Badruddin Haji Othman, the respondent's Deputy Manager, affirmed on 11 May 1992, the letter of demand and the statutory notice as well as the cause papers were properly served on the appellant at its last known place of business and had been acknowledged by the appellant. However, the A.R. registered card under which the letter of demand was sent shows the acknowledgement to be by a company called Federal Flour Mills Berhad whose rubber stamp impression appears upon the card. It is a fair inference, therefore, that this other company must have assumed occupation of the premises previously occupied by the appellant at the original address. Equally may it be fairly inferred that the respondent's solicitors, upon return of the A.R. card to them, became aware that the appellant no longer had its office at the original address.

The respondent obtained an order for sale on 17 September 1986 and took the steps usually consequent upon the making of that order, including the obtaining of directions upon a summons. An attempt to have the land sold by public auction on 5 May 1988 failed because of the absence of bidders. Thereafter the respondent did not take any steps in the matter for more than three years although there was some formal correspondence between the appellant's solicitors made up of two letters, one in February 1990 and the other in April 1990. Then, on 17 September 1991 the respondent gave notice of its intention to proceed pursuant to the provisions of O. 3 r. 6 of the Rules of the High Court 1980.

It was not until 29 October 1991 that the appellant took out a notice of motion to set aside the order for sale although there is evidence that it was aware of the order much earlier. The evidence in question is a series of searches of the court docket by the appellant, no doubt to ascertain the status of the matter from time to time. Although there was some dispute about it, the learned judge accepted that the appellant made the first of these searches on 28 January 1989.

The appellant's motion to set aside the order for sale was dismissed by the learned judge on three grounds which she expressed as follows:

> After giving due consideration to the submissions by both learned counsel, I dismissed the application with costs as I was satisfied firstly that the judgment was obtained regularly. All avenues for service had been duly exhausted by the plaintiff as they had made steps to find out the defendant's latest business address through company search. No such change of address was discovered by the plaintiff's legal clerk when the search was conducted at the office of the Registrar of Companies. Again, by virtue of cl. 16 of the Charge, the obligation to notify of a change of address remains solely with the chargor (defendant). However the defendant has failed to comply with the said clause. Further the annual returns filed by the defendant was dated 1982. As such the plaintiff had taken all reasonable steps to identify the defendant's latest business address.
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> Secondly, the delay by the defendant for five (5) years before filing this application to set aside, is inordinate and no reasonable explanation was given by the defendant for the delay.
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> Thirdly prejudice if at all, would be against the plaintiff as they had done everything required by the law in order to obtain the regular judgment and the plaintiff would be deprived of its right to realise the proceeds of sale if the judgment were to be set aside.

The appellant, in support of the appeal, contended that the learned judge erred in treating the order for sale as a mere irregularity. It was argued that the failure to serve the appellant with the statutory notice and the relevant cause papers at its registered office rendered the service and the resultant order nullities. Once it is accepted that service was bad and that the order for sale was a nullity and not a mere irregularity, the issues of delay and prejudice become irrelevant: so it was argued.

Before we deal with these arguments, it is necessary to hearken to some relevant provisions of written law as well as judicial authority upon the subject at hand. Taking written law, first, in relation to the service of Form 16D there is s. 431 (1) of the Code which makes the following provision:

431(1) Without prejudice to any other method of service, a notice may be served on a person or body for the purposes of this Act –

(a) by delivering the notice to the person; or

(b) by delivering the notice –

(i) at the person's usual or last known place of abode or business to his servant or to an adult member of his family; or

(ii) at the body's registered office or usual or last known place of business to its servant or agent; or

(c) by leaving the notice in a cover addressed to the person or body –

(i) at the person's usual or last known abode or place of business; or

(ii) at the body's registered office or usual or last known place of business; or

(d) by sending the notice by pre-paid registered post to the person or body at an address for service given in pursuance of any provision of this Act or, where no such address has been given –

(i) at the person's usual or last known abode or place of business. or

(ii) at the body's registered office or usual or last known place of business; or

(e) by substituted service in accordance with s. 432.

So far as the present appeal is concerned, it is para. (b)(ii) of s. 431(1) that is relevant. It speaks of service "at the body's registered office or usual or last known place of business". The word "or" appearing in the phrase just quoted must, in our judgment, be read disjunctively. For, a company (which is included in the expression "body") may have a registered office as well as a place of business and they may be located at the same or different addresses. By the terms of s. 431(1)(b)(ii) service at either address is sufficient. Of course, it depends upon the facts of each case whether a company has a registered office as well as a place of business and whether they are situated at the same or different addresses. In the present instance, there is evidence that the appellant had a registered office at the original address and that the statutory demand in Form 16D was delivered to that address. There is also evidence to show quite conclusively that service of the statutory demand was effected **after** the respondent had knowledge or means of knowledge that it was Federal Flour Mills Berhad and not the appellant who was in occupation of the premises at the original address. It may be added, for reasons that will

appear later in this judgment, that the word "may" appearing in the opening paragraph of s. 431(1) is not permissive but mandatory so that service of documents under the Code **must** be in compliance with the terms of the section.

The second piece of legislation is the Companies Act 1965 s. 350 of which reads:

> 350 A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

In *P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd.* [1958] MLJ 113, (an authority not cited to us by either side) the plaintiff firm took out a writ and served it on the defendant company at No. 144 Beach Street Penang. The Registrar of Companies had given that address as the registered office of the defendant. However, the writ was returned by a firm at that address under cover of a letter informing the plaintiff that the defendant company was no longer there. Nevertheless, the plaintiff, acting on the strength of the service thus effected, and after obtaining confirmation from the Registrar of Companies that the defendant's registered office was at 144, Beach Street, entered judgment in default of appearance against the defendant. Later, the plaintiff discovered from the Registrar of Companies that the registered office of the defendant had moved to 146, Beach Street Penang. The defendant then applied to set aside the judgment entered in default of appearance. Rigby J, granted the application and set aside the judgment. His Lordship, after referring to s. 319 of the Companies Ordinance 1940 the precursor to s. 350 and identically worded, and after discussing the relevant authorities said (at p. 115):

> *On the authorities it seems abundantly clear, therefore, that where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, and the court will set aside a judgment obtained by default where the requirements have not been complied with.*
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> ...
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> Personally on the facts of this case I find it almost impossible to believe that the defendant Company did not well know of the service of the Writ of Summons at 144, Beach Street and I think it probable that they deliberately elected to take no action on the matter at that stage. Nevertheless, it is a fact that the Writ of Summons was not served upon the registered office of the Company. ... *Upon the authorities I was of the opinion that since the Company had not been served with the Writ of Summons at its registered office the*

> *purported service was, therefore, bad and all proceedings thereafter were bad and the judgment obtained in default of appearance was accordingly a nullity.* (Emphasis added.)

It is axiomatic that the object of service of process is "is to bring the proceedings to the notice of the person being served, and there must be reasonable probability this object will be achieved. The procedure of "constructive service" is unknown under English law and is equally inapplicable in the Federated Malay States (see *In re a Judgment Debtor* [1937] 1 Ch. 137, followed in *In re Cespedes* [1937] 2 All ER 572)" (per Terrell JA in *Sockalingam Chettiar v. Somasundaram Chettiar* [1941] MLJ 103, 108 (CA)).

In *Johannes Koplan v. Aw Chen* [1970] 1 MLJ 220, 222, Ong CJ (Malaya), when delivering the judgment of the former Federal Court, applied with approval the following *dictum* of Diplock LJ in *Gurtner v. Circuit* [1968] 2 QB 587, 602 which, although uttered in a different context, is of general importance:

> Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely 'adjudicated upon' unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard.

In *Muniandy & Anor. v. D & C Bank Bhd & Anor* [1996] 1 MLJ 374, the defendants/chargors who had not entered an appearance to the plaintiff/chargee's summons for an order for sale nevertheless attended court on the hearing date when the plaintiff's summons was postponed. The defendants were however not served with the notice of the adjourned hearing. They were therefore absent when the plaintiff's summons came on for hearing on the next date. An order for sale of the charged lands was made in default of their appearance. The defendants unsuccessfully applied to set aside the order for sale. They then appealed to the Federal Court. The plaintiff opposed the appeal, *inter alia*, on the ground that the order for sale was a mere irregularity and that the application to set aside was barred by delay. These contentions were rejected by the Federal Court which allowed the appeal. Edgar Joseph Jr. FCJ speaking on behalf of the court dealt with the irregularity point as follows (at p. 383):

The fourth point I should like to take concerns the contention by counsel for the chargees that the effect of a breach of the rule of natural justice by reason of failure to serve the chargors or either of them with notice of the adjourned hearing was merely to render the ex parte orders an irregularity which, having regard to the circumstances of this case, should be condoned.

In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the ex parte orders obtained, in consequence, a nullity. I am supported in this by certain authorities to which I shall now refer.

In *White v. Weston* [1968] 2 All ER 842 CA, Russell LJ said this at p. 846:

> There has in the past been much discussion whether a judgment is a nullity or a mere irregularity, and for the cases on the subject I may perhaps refer to *Re Pritchard (decd)* [1963] 1 All ER 873; [1963] Ch 502, where they were discussed. UpJohn LJ in that case expressly stated at pp. 882-883; at pp. 523-524 to be a nullity proceedings which ought to have been served, but have never come to the notice of the defendant at all, excluding, of course, cases of substituted service, service by filing in default, or cases where service has properly been dispensed with. Danckwerts LJ adopted that judgment. I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as 'irregular' or 'a nullity'. The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment: '... in accordance with settled practice, the court can exercise its discretion only in one way, namely, by granting the order sought', to quote UpJohn LJ in Re Pritchard (decd) [1963] 1 All ER 873 at p. 881, letter D; [1963] Ch 502 at p. 521.
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> In cases where a defendant has applied to set aside a judgment and is entitled to such an order as of right, the court has exercised its discretion in respect of the defendant's costs of the application if the defendant declines to agree to terms suggested by the court, recognizing that the court cannot impose terms on a defendant who does not agree. But here the court, by making an order that the plaintiff's costs of the November 1966 hearing should be costs in the cause, has in effect imposed a term on the defendant, and has qualified or subtracted from his absolute right to have the judgment set aside. In my view the county court judge misdirected himself in considering that he had any power to visit, even contingently, on the defendant the plaintiff's costs of a hearing that, as against this defendant, should never have taken place at all, and to which he was a stranger.

The case of *Marsh v. Marsh* [1945] AC 271 PC shows that there is no decisive test for ascertaining what irregularities will result in a judgment being rendered void as distinct from voidable, though it was there suggested by Lord Goddard when speaking for the Board that one test which may be applied is whether the irregularity has caused a failure of natural justice.

This is how his Lordship put it (at p. 284):

> A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v. Praetorius* [1888] 20 QBD 764 and *Smurthwaite v. Hannay* [1894] AC 494 are leading examples of the former, while *Fry v. Moore* [1889] 23 QBD 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.

However, in *Wiseman v. Wiseman* [1953] 1 All ER 601, Denning LJ (as he then was) criticised the above *dictum* of Lord Goddard, in my view with considerable justification, when he said:

> It has been said that one test of the distinction between void and voidable is to inquire whether the transaction has caused a failure of natural justice; see *Marsh v. Marsh* [1945] AC 271, but I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void.

This contention by counsel for the chargees, therefore, fails.

His Lordship rejected the delay argument in the following terms:

> The fifth point I should like to deal with concerns the contention by counsel for the chargees that the chargors' application by way of summons in chambers to set aside the *ex parte* orders, dated 13 November 1992, had not been made within a reasonable time as the *ex parte* orders had been made some ten months previously, that is to say, on 29 January 1992.

In my view, lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. (See *Atwood v. Chichester* [1878] 3 QBD 722). I am further supported in this by the following passage in a very recent judgment of the Federal Court in *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p. 42:

> ... it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
>
> (a) no one has suffered prejudice by reason of the defendant's delay.
>
> (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
>
> (c) to let the judgment stand would constitute oppression. (See *Atwood v. Chichester* [1878] 3 QBD 722; *Harley v. Samson* [1914] 30 TLR 450.

We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the court. (See *Beale v. MacGregor* [1886] 2 TLR 311).

This contention by counsel for the chargees, therefore, fails.

It is convenient for us now to deal with the decision of the English Court of Appeal in *Singh v. Atombrook Ltd.* [1989] 1 All ER 385, which was relied upon by the learned judge in the present case in support of her conclusion that the failure to effect service on the appellant at its registered office merely constituted an irregularity. In that case, the plaintiff had sued the defendant in its trading name, Sterling Travel, and obtained judgment in default of appearance. The proper citation of the defendant ought to have been "Atombrook Ltd., trading as Sterling Travel". The defendant applied to have the judgment set aside on two grounds: first that the defendant had not been properly named in the writ, and second, that the writ had not been served on the defendant at its registered office. The District Registrar set aside the default judgment on condition that the defendant pay into court the full sum claimed by the plaintiff. On appeal by the defendant, Hutchinson J, affirmed the registrar's order and also directed that the writ be amended to properly reflect the defendant's name. A further appeal by the defendant to the Court of Appeal was dismissed. That court (Kerr LJ and Sir John Megaw) held, *inter alia,* that the failure to serve the writ in accordance with s. 725(1) of the United Kingdom Companies Act 1985 (which is in *pari materia* with s. 350 of our Companies Act) was a mere irregularity, curable under RSC O. 2 r. 1(1). Kerr LJ, expressed his view on the point in the following way (at p. 390 of the report):

Counsel for the defendant claims that it (the default judgment) was a nullity on two grounds. First, and this is the order which he adopted, the writ was served on the defendant at an address other than its registered address. In that regard he relied on s. 725(1) of the Companies Act 1985, which provides:

> A document may be served on a company by leaving it at, or sending it by post to, the company's registered office.

That provision is echoed in O. 10 r. 1(2) and (7) and O. 65 r. 3(2), but I do not think it is necessary to refer to those rules, which do not go further than s. 725. Counsel for the defendant submits that a writ served on a body corporate elsewhere than at its registered address is simply a nullity and that although the word in the section is 'may' it is to be read as 'must'. For that purpose he relies on a decision of Eve J in *Vignes v. Stephen Smith & Co Ltd*. [1909] 53 SJ 716, in which a writ had been served on a company elsewhere than at its registered office and Eve J held that that writ could not stand. He said in relation to the predecessor of s. 725:

> Now counsel for the plaintiff points out that the words in the section and in the rule are "may be served" and not "must be served," and he says that the court may look at the surrounding circumstances and say whether the fact that the writ has been issued has been brought home to the company, and whether the company have not done all that is necessary for that purpose, and he cited cases where the writ was not set aside, though the rule had not been strictly adhered to. Those cases were mostly cases of foreign companies, and are not really germane to the present case. Here the question is whether it is competent to serve a company with a writ except in the prescribed form. I am precluded by the decisions cited by the defendants' counsel from holding that the writ has been properly served. The rule and the section clearly indicate that the only way in which a writ can be served on a company is by leaving it at or sending it by post to the registered office. There will therefore be an order setting aside the writ.

There are a number of things to be said about that decision, apart from the fact that it does not appear to have been referred to in any subsequent case, at any rate nor one which has been cited to us. First, the judge was not concerned with any application for amendment of the address for service, or of the process, or of anything which would have been in the previous O. 70 or the predecessor of what is now O. 2 r. 1. That simply did not arise. The only question was whether the writ could stand or whether it should be set aside.

Second, the strictness of that interpretation of the word 'may' in legislation which deals with service by various means is not borne out by two subsequent decisions. The first was a decision of this court in *Re Sharpley and Manby's Arbitration* [1942] 1 All ER 66, [1942] KB 217, in which the relevant statutory provision stated that one of the ways of serving process might be by registered post. But it was held that sending it by ordinary post was a sufficient compliance with the word 'may' in that provision. It is true that the result of that case can also be justified by reference to another provision which rendered it sufficient if the process had been brought to the attention of the defendants.

That was pointed out in the second of these cases by Wynn-Parry J in *Stylo Shoes Ltd. v. Prices Tailors Ltd.* [1959] 3 All ER 901 at 905, [1960] Ch 396 at 405. He dealt with *Re Sharpley and Manby's Arbitration* and pointed out that the decision could be explained on the basis that another part of that provision was satisfied, and that it was not necessarily based on the interpretation of the word 'may'. But he went on:

> But there is another point which to my mind was fatal to the tenants in this case. On the reasoning of the members of the Court of Appeal in *Tennant v. London County Council* [1957] 121 JP 428) I feel constrained to construe s. 23(1) as being permissive so far as the mode of service is concerned. It is perfectly true, as was pointed out by counsel for the tenants, that the requirement that the notice etc is to be in writing is imperative – "Any notice, request, demand or other instrument under this Act shall be in writing"; but then when the subsection goes on to deal with service the permissive verb "may" is used, and that is in clear contradistinction to the imperative "shall". I can see no canon of construction which would entitle me to qualify the nature of the verb "may" by anything that has gone before in the subsection.

It is true, of course, that that was an entirely different provision from s. 725 of the 1985 Act and it may well that the decision of Eve J is still good law so far as what is now s. 725 is concerned, viewed in isolation.

But even if that is so, and I must say that I have some doubts as to why 'may' must be construed as 'must' in that provision, it appears to me quite clear that even if there were an irregularity under the statute to that extent, and therefore also under the rules which contain provisions to the same effect, it would nevertheless be insufficient to render the proceedings a nullity so as to entitle the defendant to have them set aside *ex debito justitiae*. Any other view would produce an extraordinary result in the face of O. 2 r. 1 and the note to it which I have read. Accordingly I would reject that submission.

It is clear from the foregoing passages that Kerr LJ, accepted the decision of Eve J in *Vignes v. Stephen Smith & Co Ltd.* as correct but was prepared to decide the case on a dual basis – (1) that the requirement of service in the Untied Kingdom equipollent of s. 350 of our parallel statute is merely directory; (2) that even if the section is to be regarded as mandatory, any defect in service is curable by reference to RSC O. 2 r. 1. However, having given the matter much thought, we have come to the conclusion that we must, with great respect and for good reasons decline to accept and act upon this rationale.

First, it has been recognised by high authority that when a provision in a statute uses permissive language such as "may" it is a question of legislative intent, dependent upon a number of factors, whether the intended result is mandatory or directory. As Lord Campbell C.J. said in *Liverpool Borough Bank v. Turner* [1861] 30 LJ Ch. 379, 380:

> No universal rule can be laid down ... It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

Again, in *Howard v. Bodington* [1877] 2 PD 203, 211, Lord Penzance said:

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory ...
>
> I have been very carefully through all the principal cases but upon reading them all, the conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Borough Bank v. Turner* [1861] 30 LJ Ch. 379.

We do not apprehend the approach to statutory interpretation formulated in the cases cited above to have altered or modified through passage of time. And no authority was cited to us during argument to suggest anything to the contrary.

It is therefore wrong to assume as a matter of course that whenever Parliament uses the word "may" in a statute it never means "must". With respect, the court in *Singh v. Atombrook* does not appear to have sufficiently appreciated this point of construction and therefore fell into error that respectable precedent warned against.

In any event, there is at least one case which has interpreted "may" as "must" in relation to service of process. In *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261, the Privy Council construed the words "such service may be effected" appearing in r. 15 of the rules contained in the Second Schedule to the Election Offences Ordinance 1954 as a mandatory requirement.

Second, the reasoning that a breach of a statutory provision regulating the mode of service (accepted by Kerr LJ to be imperative) is curable by reference to a rule of court is unsupported by authority. Indeed, the learned Lord Justice in support of the proposition cited none. With respect, we find it entirely incongruent to have resort to rules of court to cure the breach of a statutory provision relating to service of documents.

Third and last, the approach taken by Kerr LJ on the distinction between irregularities and nullities in civil procedure does not appear to accord with the views expressed in *Muniandy v. D & C Bank Bhd (supra) and Lai Yoke Ngan & Anor. v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565. These decisions which plainly bind this court recognise that certain breaches of procedure are placed beyond the curing provisions of the Rules of the High Court 1980.

For the reasons foregoing we prefer the decision of Rigby J, in *P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd (supra)* to that of the English Court of Appeal in *Singh v. Atombrook Ltd.*

We have thus far confined ourselves to the point relating to the service of the court's process upon the appellant. But there is yet another matter that calls for attention. It has to do with the service of the notice in Form 16D upon the appellant. In our judgment the word "may" appearing in s. 431(1) of the Code is not merely directory. It is imperative. Our reasons for so holding are as follows.

(1) The ownership of immovable property and all things appurtenant thereto is a very valuable right. It has been placed on a constitutional footing as a fundamental right by art. 13 of the Federal Constitution. Accordingly, any deprivation of immovable property must be in strict compliance of both substantial and procedural law.

(2) The effect of an order for sale and the proceedings subsequent thereto, including the holding of a public auction, are designed to permanently deprive a registered proprietor of his land. It is therefore of utmost importance that such deprivation is undertaken in strict compliance of the law.

(3) The provisions in the Code that govern the enforcement of registered charges exist not only as a means of a lender recovering his money but also for the protection of the chargor. See, *Kimlin Housing Development Sdn. Bhd. v. Bank Bumiputra Malaysia Berhad & Ors* [1997] 3 AMR 2361. The court, by treating the service provision in s. 431(1) as mandatory would ensure that the protection given by the Code is not rendered illusory.

Applying what we apprehend to be the relevant principles to the facts of the present appeal we arrive at the following conclusions:

(1) The statutory demand by way of Form 16D was not served upon the appellant in the manner prescribed by the Code. We agree with the submission of Encik Narayanan for the appellant that cl. 16 of the annexure, which the learned judge relied upon, is, with respect, irrelevant in the present case. To recapitulate, that clause speaks of service at the appellant's registered office or at the "usual or last known place of business of the Chargor". However, in the present instance, there is no positive evidence to show that the original address was at any time the "usual or last known place of business" of the appellant. The mode of service prescribed by s. 431(1)(b) of the Code is in terms imperative and the respondent's failure to comply with that section vitiates the order for sale.

(2) In any event the originating summons seeking an order for sale and the other relevant cause papers were not served on the appellant at its registered office. Applying the decision in *P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd (supra)* with which we are in agreement, there was in the eyes of the law no service of the summons and other cause papers upon the appellant.

(3) Since the order for sale was obtained when there was no service of the court's process upon the appellant as required by law, the order for sale was, and remains, a nullity in accordance with the decision of the Federal Court in *Muniandy v. D & C Bank Bhd (supra)*.

Encik Porres Royan has very properly drawn our attention to the effect of a decision in the appellant's favour in this appeal. He says that if the order for sale is set aside it would result in much delay and prejudice to the respondent which has to re-commence the proceedings after a lapse of more than eleven years. That is quite true. But when the facts are carefully analysed, it will be found that the consequence that counsel complains of as being visited upon his client's head is the direct result of its own failure to observe the fundamental rules regulating service of documents. The order for sale obtained

by the respondent is, on the authorities we have discussed, a nullity and passage of time cannot metamorphose it into a valid order. Much as we may sympathise with the sentiments expressed by Encik Royan, we have no alternative but to apply the law as we perceive it to be to the facts of the case.

It is clear that the learned judge in the court below misdirected herself on the relevant law applicable to the fact pattern before her. Had she directed herself adequately on the principles that governed the case she would have come to a conclusion diametrically opposite to that she arrived at.

For the reasons already given, we have no alternative but to allow this appeal. The order of the learned judge dated 15 December 1995 is set aside. There shall be entered in the appellant's favour an order in terms of prayer (1) of its notice of motion dated 29 October 1991. The order for sale dated 17 September 1986 and all proceedings subsequent thereto are accordingly set aside.

The appellant had, in prayer (2) of its notice of motion, also asked for further and other directions. Since we are of the view that the Form 16D was not properly served on the appellant, it follows that the respondent was not entitled to move the court for an order for sale.

Accordingly, we direct that the respondent's originating summons dated 26 March 1986 do stand dismissed. The appellant will have the costs of this appeal and the costs incurred upon its motion in the court below. The deposit lodged in court by the appellant shall be refunded to it.

Before concluding this judgment we would express our appreciation to both counsel for their careful and well-researched submissions before us. The manner in which they presented their arguments has lightened our task.